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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

IN SOON LEE,

Plaintiff and Appellant,

v.

ANNA LEE KIM,

Defendant and Respondent.

B217381

(Los Angeles County  
Super. Ct. No. BC393375)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael Stern, Judge. Reversed and remanded.

James S. Link; Law Offices of Peter B. Beck and Peter B. Beck for Plaintiff and appellant.

Law Office of Benjamin Blakeman and Benjamin Blakeman for Defendant and Respondent.

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## INTRODUCTION

Believing that she would soon die of liver disease, appellant In Soon Lee transferred property in equal shares to her four children. Appellant then recovered from her illness and wanted her property back. Three of her children complied, but one daughter, respondent Anna Lee Kim, did not. Appellant then brought this action to recover the property as well as damages on the ground that the gift was made in view of impending death (a gift *causa mortis*), and therefore revocable.<sup>1</sup> The trial court sustained respondent's general demurrers to the second amended complaint without leave to amend, and the action was dismissed.

Appellant contends that the second amended complaint adequately states causes of action for rescission of a gift in view of impending death, fraud, and, in the alternative, revocation of an inter vivos gift due to undue influence, as well as damages for fraud and breach of contract. She seeks reversal of the judgment of dismissal. Although the second amended complaint is far from a model pleading, we agree that the demurrers should not have been sustained without leave to amend, and we reverse. Because all appellant's theories of recovery are based upon the same facts (which are incorporated into each count), we do not reach each theory separately.

## STATEMENT OF THE CASE

Appellant commenced this action on June 26, 2008, by filing a complaint alleging breach of contract and fraud. In November 2008, appellant filed a first amended

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<sup>1</sup> A gift *causa mortis* is automatically revoked by the giver's recovery from illness and may be revoked by the giver at any time prior to death or in his or her will. (Prob. Code, §§ 5702, subd. (a), 5704.) An inter vivos gift that is not made in view of impending death cannot be revoked by the giver. (see Civ. Code, § 1148; *Rosenberg v. Broy* (1961) 190 Cal.App.2d 591, 596.)

Unless otherwise stated, all remaining statutory references are to the Probate Code.

complaint containing four counts: rescission, restitution, damages for fraud, and damages for breach of contract. After respondent's demurrers were sustained with leave to amend, appellant filed a second amended complaint (the complaint) on January 27, 2009.

A summary of the allegations in appellant's three complaints follows:

Original complaint:

Appellant's original complaint was filed on a Judicial Council form. According to Paragraph BC-1, which contains the principal allegations at issue:

- SNI Holdings, Inc.'s (SNI) is described as a corporation. SNI's only asset was a piece of commercial property located on Western Avenue in Los Angeles (hereinafter "the property").
- On or about May 1, 2006, appellant was gravely ill and believed she was going to die.
- Respondent, one of appellant's daughters, persuaded appellant to convey all her interest in SNI Holdings to her children.
- Appellant agreed to convey a 25 percent interest in SNI to each of her four children. Each of the children agreed<sup>2</sup> to reconvey their respective interests if appellant survived her illness.

We are unable to find any demurrer to the original complaint in the record.

First amended complaint:

- Paragraph 6: On or about April 29, 2004, appellant purchased the property. Thereafter, appellant transferred the property to SNI Holdings, LLC (note

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<sup>2</sup> Paragraph BC-1 of the original complaint does not state whether the agreements were oral or in writing.

that SNI is now described as a LLC.<sup>3</sup>) Appellant's oldest son (Sea Kwang Lee) agreed with appellant that he was holding his ownership of SNI in trust on behalf of appellant. Accordingly, appellant alleged she was the actual owner and manager of SNI.

- Paragraph 7: On or about May 26, 2006, appellant became gravely ill and believed she was going to die. On or about December 13, 2006, respondent persuaded appellant to convey all of her interest to SNI to her children. Appellant agreed to gift a 25 percent interest in the property to each of her four children "only if she did not survive her illness." All of her children acknowledged this *causa mortis* gift. Appellant instructed Sea Kwang Lee to transfer a 25 percent interest of SNI to each of the four children.
- Paragraph 8: Appellant survived and on May 25, 2008, demanded that her children return their respective interests in SNI. Although three of the children did so, respondent refused to return her 25 percent interest.

Respondent demurred to the first amendment complaint, and the court sustained it with leave to amend.

Second amended complaint:

- Paragraph 5: In March 2004, appellant wanted to purchase the property. On or about April 29, 2004, she established SNI Holdings, LLC, solely with her own money to buy the property in order to generate retirement income. Appellant owned 100 percent of SNI but was advised that the operating agreement of SNI should have one of her children as its sole member. In the operating agreement of SNI, appellant chose her oldest son

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<sup>3</sup> "L.L.C." denotes a limited liability company, which is an organization of members, formed by filing articles of organization with the California Secretary of State, either before or after the members of the company have entered into an operating agreement. (Corp. Code, § 17050.)

Sea Kwang Lee to be listed as the sole member. The operating agreement also listed appellant as the manager of SNI.<sup>4</sup> The oldest son understood that appellant owned all of SNI and agreed with appellant that he would “hold his ownership interest in of SNI in trust on behalf of [appellant] who was the true owner of all the interest if SNI, and return it whenever [appellant] demands it.” Thus appellant was SNI’s actual owner.

- Paragraph 6: On or about June 8, 2004, appellant secured a bank loan to buy the property. She was the one who signed a “Limited Liability Company Resolution to Borrow/Grant Collateral” as the sole member of SNI, and she also signed a personal guarantee for the loan.
- Paragraph 7: In June 2006, appellant became gravely ill and thought she was going to die. Her daughter (respondent) persuaded her that since there was a high probability of appellant dying, appellant needed to “administer to her estate needs.” On or about December 13, 2006, respondent persuaded appellant to meet with an estate and trust attorney. Appellant and her children did so.
- Paragraph 8: At the office of the estate and trust attorney, respondent persuaded appellant to convey equal portions of SNI to her children. Respondent directed the attorney to draft a document conveying a 25 percent interest in SNI to each child. Believing she was going to die soon, appellant instructed her son to give a 25 percent interest in SNI to each of her four children, but if appellant survived, “her children . . . orally agreed to return their respective interests.” Appellant instructed her oldest son to make the transfers, and Sea Kwang Lee executed a document conveying a 25 percent interest in SNI to each child.

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<sup>4</sup> Although there is no specific averment, we assume that appellant was alleging that the operating agreement was in writing.

- Paragraph 9: Appellant survived and asked her oldest son, “as her trustee,” to return her interest in SNI, which he did. Appellant then demanded that her children return their interests, and all of them except the respondent did so.

With respect to the second amended complaint:

- Appellant’s first cause of action, for rescission, incorporated the foregoing allegations and added that the gift to her children was made in view of impending death, revocable upon her recovery, and that she in fact did revoke the gift when she recovered. It further alleged that appellant demanded the return of the gift, but respondent has refused.
- The second cause of action incorporated the common allegations and sought restitution of the gift based on undue influence. It further alleged that in May 2006, appellant placed her trust and confidence in respondent, who took advantage of appellant’s weakened mental and physical condition to induce her to transfer the property to her children and then refused appellant’s demand for return of the property.
- The third cause of action for fraud incorporated the common allegations and also alleged that on December 1, 2006, respondent falsely represented to appellant, in order to induce appellant to make the gift, that she would return the gift if appellant survived her illness. Appellant then averred that respondent had no intention of doing so. The complaint alleged that appellant was ignorant of the falsity of the representation and believed it to be true; she relied upon the misrepresentation and was induced thereby to make the gift, to her damage -- the loss of her interest in SNI.
- The fourth cause of action for breach of contract incorporated the common allegations and further alleged that respondent orally agreed to return the gift if appellant survived her illness, that appellant did survive her illness

and demanded that respondent retransfer her interest, but respondent refused to do so.

Once again, respondent interposed general demurrers to each cause of action of the complaint.<sup>5</sup> The demurrers were based not only upon the second amended complaint, but also upon admissions in the original and first amended complaints and the previously judicially noticed copy of a grant deed to the property, which was recorded on June 15, 2004. The grant deed names JC 101 LLC as the grantor, and SNI as the grantee.

This time the trial court sustained the demurrers without leave to amend. On May 11, 2009, the court entered judgment dismissing the action. Appellant filed a timely notice of appeal.

## DISCUSSION

### 1. *Standard of Review*

On appeal from a judgment of dismissal entered after a general demurrer is sustained, our review is de novo. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) We examine the allegations of the complaint to determine whether it states a cause of action, and if not, we determine whether there is a reasonable possibility that it could be amended to do so. (*MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536, 542.) “In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties.” (Code Civ. Proc., § 452.) ““We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] . . .’ [Citation.] [W]e give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.]” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) We may also consider matters that have been properly judicially noticed. (*Ibid.*)

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<sup>5</sup> Respondent did not file any special demurrers.

Further, “we are not limited to [appellants’] theory of recovery in testing the sufficiency of their complaint against a demurrer, but instead must determine if the *factual* allegations of the complaint are adequate to state a cause of action under any legal theory. The courts of this state have, of course, long since departed from holding a plaintiff strictly to the ‘form of action’ he has pleaded and instead have adopted the more flexible approach of examining the facts alleged to determine if a demurrer should be sustained. [Citations.]” (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 103.)

Where separate counts are based upon detailed factual allegations incorporated from another count, as the common allegations are in this case, each count must “stand or fall” with each other count. (See *Lambert v. Southern Counties Gas Co.* (1959) 52 Cal.2d 347, 353.) This is so regardless of what the pleader has chosen to call the cause of action. (*Porten v. University of San Francisco* (1976) 64 Cal.App.3d 825, 833.) “Mistaken labels and confusion of legal theory are not fatal . . . if [the] complaint states a cause of action on any theory. . . . [citations] [the] action cannot be defeated merely because it is not properly named.” (*Ibid.*) Thus, if we find a cause of action pleaded in the common allegations, we need not review the counts that incorporated them.

We review the trial court’s decision to deny leave to amend for an abuse of discretion. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 459.) It is ““an abuse of discretion to sustain a demurrer without leave to amend if there is a reasonable possibility that the defect can be cured by amendment. [Citations.]”” (*Scott v. City of Indian Wells* (1972) 6 Cal.3d 541, 549.) “When any court makes an order sustaining a demurrer without leave to amend the question as to whether or not such court abused its discretion in making such an order is open on appeal even though no request to amend such pleading was made.” (Code Civ. Proc., § 472c, subd. (a).) Thus, an “abuse of discretion is reviewable on appeal ‘even in the absence of a request for leave to amend’ [citations], and even if the plaintiff does not

claim on appeal that the trial court abused its discretion in sustaining a demurrer without leave to amend.” (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 971.)

## **2. Recovery of Revoked Gift Causa Mortis**

“A gift made during the last illness of the giver, or under circumstances which would naturally impress the giver with an expectation of speedy death, is presumed to be a gift in view of impending death.” (§ 5703.) The common allegations averred that either directly or indirectly, appellant made the gift to respondent of either a share in SNI or a share in a trust created by appellant. All of the complaints alleged that appellant made the gift because appellant thought she would die soon from her liver disease, and that respondent understood this reason. The gift is thus presumed to have been one in view of impending death -- in *causa mortis*. (See § 5703; *Rosenberg v. Broy* (1961) 190 Cal.App.2d 591, 596.)

Appellant alleges in the common allegations that because she recovered from her illness, the gift was revoked by operation of law, and appellant has demanded its return. (§ 5704, subd. (a)(1).) A cause of action lies for the return of a revoked gift *causa mortis*. (See *Odone v. Marzocchi* (1949) 34 Cal.2d 431, 436-438; see also *Yates v. Dundas* (1947) 80 Cal.App.2d 468, 473 [“A gift in view of death may be revoked at any time by the giver, and it is revoked by law upon his recovery from the illness, or escape from the peril, under the presence of which it was made”].) A party who fails to return the personal property of another upon demand by the rightful owner is liable for conversion, whether the property is tangible or intangible. (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 119.) The rule is no different for personal property lawfully acquired by the converter. (*Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 918.)

The problem in this case is not with this cause of action; it exists no matter what appellant chose to call her claim. (See *Barquis v. Merchants Collection Assn.*, *supra*, 7 Cal.3d at p. 103.) The problem is with appellant’s poorly pleaded language that makes it difficult to tell whether appellant is the proper plaintiff. The complaint can be read to

mean that appellant has no standing because SNI owns the property and thus appellant had nothing to give to her daughter. The complaint can also be read to mean that appellant was the beneficiary of the trust that owned SNI and that she made a *causa mortis* gift to each child, including respondent, of 25 percent of her interest in SNI. In this connection, appellant contends that the second amended complaint adequately alleges, in essence, that SNI was held in a revocable trust,<sup>6</sup> that she was the settlor and sole beneficiary of the trust, with Lee as the trustee, and that she directed the trustee to make a gift *causa mortis* in equal shares of SNI. She concedes that the complaint does not make clear whether the trust was terminated or whether she gave her children a gift *causa mortis* in her beneficial interest in the trust.

“A gift is a transfer of personal property, made voluntarily, and without consideration.” (Civ. Code, § 1146.) The allegation that SNI owned the real property, which was held in trust to generate income for appellant, adequately alleged that appellant gave her children an interest in personal property. (See *Ephraim v. Metropolitan Trust Co.* (1946) 28 Cal.2d 824, 835.) If appellant meant to allege that she terminated the trust when she gave the gifts, the interest she transferred was a share in SNI.

Relying on *Yates v. Dundas*, *supra*, 80 Cal.App.2d 468, respondent contends that the gift was invalid because the complaint does not allege delivery. “[T]he form of a gift in view of death is as absolute and unconditional as a gift inter vivos. The title must pass to the donee at the time the gift is made and the donor must part absolutely with all control and with the title, subject only to the condition imposed by law that it may be revoked, in which case the title is regained by the giver. [Citation.]” (*Id.* at p. 473, italics omitted.) *Yates* was an action by an alleged donee to enforce a gift *causa mortis*, and the alleged donor set up -- as a defense -- the invalidity of the gift due to lack of delivery. The court in that case did not hold that a donee may keep a revoked gift *causa*

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<sup>6</sup> A trust is presumed to be revocable by the settlor, unless the trust instrument expressly makes it irrevocable. (§ 15400.)

*mortis* if there was a defect in delivery. Consistent with the law, the court stated the rule that “‘if the donor should survive, or he should repent of having made the gift, . . . then the donor shall receive back the thing given’. . . [Citation.]” (*Ibid.*)

Respondent also contends that appellant could not make a gift of her interest in SNI, because the grant deed respondent presented for judicial notice shows that appellant was not the owner of SNI’s real property. This is true; SNI owned it. But that does not mean that appellant is barred from asserting a cause of action. The second amended complaint also alleges, at paragraph 5, that SNI was held in trust for appellant. The ambiguous averment that she was the owner (or the “true” owner) of SNI and that her ownership in SNI was held by Lee in trust appears to be slipshod pleading. Indeed at the oral argument counsel put forth the theory that the complaint tacitly pleaded that the trust had been terminated and that upon amendment, he would add more allegations to the effect that at the meeting with the estate planning attorney on December 13, 2006, the trustor (appellant) and the trustee (her eldest son) terminated the trust so that appellant could make her *causa mortis* gifts. An ambiguous averment will not justify sustaining a general demurrer so long as the necessary facts are shown to exist. (Code Civ. Proc., § 452; *American Tel. & Tel. Co. v. California Bank* (1943) 59 Cal.App.2d 46, 53.) However imperfectly, we think appellant has shown the necessary facts.

Assuming that the trust was not terminated, respondent contends that as the beneficiary of the trust, appellant had no ownership interest in SNI to convey or recover. We agree that it is the trustee who must sue to recover trust assets, because the trust beneficiary has no legal title or ownership interest in them. (*Saks v. Damon Raika & Co.* (1992) 7 Cal.App.4th 419, 427.) It is up to the trustee to enforce the trust’s cause of action against a third party, and when the trustee cannot or refuses to do so, the beneficiary is limited to an action against the trustee. (*Ibid.*) However, a beneficiary who is the settlor, sole beneficiary, and a trustee may sue a third party in his or her own name for damage to the trust property. (*Hassoldt v. Patrick Media Group, Inc.* (2000) 84 Cal.App.4th 153, 170-171.)

One can infer from the second amended complaint that appellant was the sole beneficiary of the alleged trust. Appellant alleged that she paid for SNI in large part with her own funds and personally guaranteed the loan for the remainder, thus making her the “true owner.” Although appellant did not directly allege in the second amended complaint that she was a trustee, she alleged that her trustee made the transfers to and from her children at her direction and that she managed SNI. Appellant claims that such allegations show that she was the settlor and continued to maintain control over the trust assets, and that she either terminated the trust in order to make the gifts *causa mortis*, or she transferred her beneficial interest in the trust to her children.

Thus, the alleged facts could suggest that appellant was the settlor/sole beneficiary, and they imply that she was a cotrustee or successor trustee with standing to sue in her own name. (See *Hassoldt v. Patrick Media Group, Inc.*, *supra*, 84 Cal.App.4th at pp. 170-171.) However, the facts could also imply that appellant revoked her living trust when she directed Lee to return all her interest in SNI, and she thus brings this action as the owner of SNI. This ambiguity renders the complaint uncertain, but not subject to a general demurrer -- particularly without leave to amend. (See *Skopp v. Weaver* (1976) 16 Cal.3d 432, 441.) “It is axiomatic that if there is a reasonable possibility that a defect in the complaint can be cured by amendment or that the pleading liberally construed can state a cause of action, a demurrer should not be sustained without leave to amend.” (*Ibid.*; see also Code Civ. Proc., § 452.)

We agree with respondent that appellant may not maintain this action if the trust continues to exist and Lee is the sole trustee. (Code Civ. Proc., § 367; *Wolf v. Mitchell, Silberberg & Knupp* (1999) 76 Cal.App.4th 1030, 1036.) However, appellant argues that she terminated the trust, and SNI was no longer a trust asset when she made the gifts. We find no allegation in the complaint that clearly states that the trust was terminated. Upon remand, the trial court may in its discretion require the clarification of uncertainties and

ambiguities in the complaint. (*Columbia Pictures Corp. v. DeToth* (1945) 26 Cal.2d 753, 762.)<sup>7</sup>

We conclude that lurking within the second amended complaint are facts that may suffice to allege a cause of action to recover a revoked gift *causa mortis*, although it is not clear that appellant is the proper plaintiff. We understand why the trial court reached the conclusion it did. One must look hard for these facts, for they are easy to miss in this rather confusing pleading. Unlike the trial court with a crowded calendar and precious little time, we have the luxury to conduct a more thorough search. We also have the benefit of an extended oral argument in which counsel -- armed with hindsight -- explained what he would do were he given leave to amend. As appellant has indicated that she can amend the complaint to clarify her right to bring the action, she should be permitted to do so. (*O'Flaherty v. Belgium*, *supra*, 115 Cal.App.4th at p. 1095.)

Since we have found a cause of action in the common allegations, we need not consider the four theories of recovery set forth in the counts that incorporate them. (See *Lambert v. Southern Counties Gas Co.*, *supra*, 52 Cal.2d at p. 353; *Porten v. University of San Francisco*, *supra*, 64 Cal.App.3d at p. 833.)<sup>8</sup> Moreover, we do not believe that the three complaints contain fundamentally contradictory averments so as to preclude appellant from the ability to plead further in this regard.

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<sup>7</sup> If the trust had not been revoked, the facts indicate that appellant would have been able to seek leave to substitute the trustee as the plaintiff if necessary or to add him as a defendant if he refused to act, thereby avoiding dismissal for lack of standing. (See *O'Flaherty v. Belgium* (2004) 115 Cal.App.4th 1044, 1095.)

<sup>8</sup> At oral argument appellant's counsel said that were he granted leave to amend, he would also add a cause of action for promissory estoppel. Based upon the record before us, it appears that such cause of action can be alleged. (See *Schultz v. Harney* (1994) 27 Cal.App.4th 1611, 1623)

### **DISPOSITION**

The judgment is reversed and the cause remanded to permit the filing of a third amended complaint. Appellant shall have costs on appeal.

MOHR, J.\*

WE CONCUR:

RUBIN, ACTING P.J.

BIGELOW, J.

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.